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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 433

DAVID RINES, ADMINISTRATOR OF THE ESTATE OF LUCY L. RINES, *Appellant*

v.

THE HONORABLE JUSTICES OF THE SUPERIOR COURT, *Appellees*

APPELLANT'S MOTION TO SUPPLEMENT THE RECORD AND MEMORANDUM

DAVID RINES
RINES AND RINES
Attorneys for the Appellant,
No. Ten Post Office Square,
Boston 9, Massachusetts

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

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No. 433

DAVID RINES, ADMINISTRATOR OF THE ESTATE OF LUCY L. RINES, *Appellant*

v.

THE HONORABLE JUSTICES OF THE SUPERIOR COURT, *Appellees*

APPELLANT'S MOTION TO SUPPLEMENT THE RECORD

Now comes the appellant in the above-entitled suit, David Rines, Administrator of the Estate of Lucy L. Rines, and moves for an order permitting him to supplement the record of the above-entitled suit by adding thereto the following:

1. The annexed Exhibit A, a certified copy of the record in the Supreme Judicial Court of the Commonwealth of Massachusetts, No. 11,207, David Rines, Administrator of the Estate of Lucy L. Rines, "Plaintiff's Petition to Establish the Truth of Exceptions", in the suit in the Superior Court for the Commonwealth of Massachusetts, No. 42024,

David Rines, Administrator of the Estate of Lucy L. Rines v. Armin Klein.

2. The annexed Exhibit B, a certified copy of the record in the Supreme Judicial Court of the Commonwealth of Massachusetts, No. 11,208, David Rines, Administrator of the Estate of Lucy L. Rines, "Plaintiff's Petition to Establish the Truth of Exceptions", in the suit in the Superior Court for the Commonwealth of Massachusetts, No. 42028, David Rines, Administrator of the Estate of Lucy L. Rines v. Reuben B. Davidoff.

3. A petition for rehearing, and the action taken thereon, in the suit, No. 11,262, in the Supreme Judicial Court of the Commonwealth of Massachusetts, entitled, David Rines, Administrator of the Estate of Lucy L. Rines, Petitioner v. The Honorable Justices of the Superior Court, Respondents. This is the suit involved in this appeal.

It is further moved that this Court request the Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts to send to this Court, for inspection, the said petition for rehearing, and also a like petition for rehearing in the companion case, No. 11,261. The Chief Justice has stated to this appellant that he will honor such request.

The grounds for this motion are stated in the accompanying memorandum, from which it appears that this Court will need these additional documents, or, at least, may need them, to help this Court decide whether the appellant is correct in his contention, on this appeal, that he has been denied due process.

DAVID RINES
RINES AND RINES
Attorneys for the Appellant,
No. Ten Post Office Square,
Boston 9, Massachusetts

Supreme Court of the United States

OCTOBER TERM, 1953

No. 433

DAVID RINES, ADMINISTRATOR OF THE ESTATE OF LUCY L. RINES, *Appellant*

v.

THE HONORABLE JUSTICES OF THE SUPERIOR COURT, *Appellees*

APPELLANT'S MEMORANDUM IN SUPPORT OF HIS MOTION TO SUPPLEMENT THE RECORD

This is a motion by the appellant for an order permitting him to supplement the record in the above-entitled suit by adding thereto the following:

1. The annexed Exhibit A, a certified copy of the record in the Supreme Judicial Court of the Commonwealth of Massachusetts, No. 11,207, David Rines, Administrator of the Estate of Lucy L. Rines, "Plaintiff's Petition to Establish the Truth of Exceptions", in the suit in the Superior Court for the Commonwealth of Massachusetts, No. 42024, David Rines, Administrator of the Estate of Lucy L. Rines v. Armin Klein.

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3. A petition for rehearing, and the action taken thereon, in the suit, No. 11,262, in the Supreme Judicial Court of the Commonwealth of Massachusetts, entitled, David Rines,

Administrator of the Estate of Lucy L. Rines, Petitioner v. The Honorable Justices of the Superior Court, Respondents. This is the suit involved in this appeal.

The above-entitled suit and the companion suit, No. 434 are appeals from the final rescript or judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts made and entered on July 3, 1953.

The records of the said Exhibits A and B, under items 1 and 2, are the same as those that are referred to in the "STATEMENT AS TO JURISDICTION" in the above-entitled suit, under the heading: "Opinions Below".

The Petition for Rehearing, item 3, is discussed in the said "STATEMENT AS TO JURISDICTION" under the heading "The Nature of the Case, The Rulings Which Give Jurisdiction and The Manner In Which The Federal Questions Sought To Be Reviewed Were Raised", and it is there stated that, under the practice in the said Supreme Judicial Court, neither petitions for rehearing nor the action taken thereon are made of record.

Prior to the said rescript or judgment, the appellant had contended that, as applied, the state statute, chapter 231, section 127 of the General Laws of the Commonwealth of Massachusetts, is repugnant to the Fourteenth Amendment.

The said rescript or judgment, however, raised the issue of the repugnancy of two additional state statutes, chapter 231, sections 113 and 111 of the said General Laws. Prior to the said rescript or judgment, therefore, the appellant had not been afforded an opportunity to place himself of record as to that additional issue.

The appellant accordingly attempted to bring that additional issue before the Supreme Judicial Court by petitions for rehearing in the said two suits. These petitions for rehearing were denied, without opinion.

According to the practice in the Supreme Judicial Court, however, neither petitions for rehearing, nor the action taken thereon become part of the record. The appellant has no remedy, therefore, for placing these additional docu-

ments before this Court, other than through the remedy of this motion.

The Chief Justice of the Supreme Judicial Court of The Commonwealth of Massachusetts has stated to the appellant that, since the said petitions for rehearing and the action taken thereon are not matters of record in his court, it is his opinion that they therefore are not properly matters to be considered by this Court; but that, if this Court should disagree with this opinion, he will gladly submit the said petitions for rehearing and the action taken thereon in response to a simple request from this Court that that be done.

DAVID RINES
RINES AND RINES
Attorneys for the Appellant,
No. Ten Post Office Square,
Boston 9, Massachusetts

Service of copies of the annexed motion to supplement the record, Exhibits A and B referred to therein, and the Memorandum in Support of the said motion is acknowledged this 23rd day of October, 1953.

HARRIS A. REYNOLDS
Assistant Attorney General
Attorney for the Appellees

EXHIBIT A

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

Norfolk, ss.

DAVID RINES, ADMINISTRATOR OF ESTATE OF LUCY L. RINES,
PETITIONER TO ESTABLISH THE TRUTH OF EXCEPTIONS

Plaintiff's Petition to Establish the Truth of Exceptions

To the Honorable the Justices of the Supreme Judicial Court for the Commonwealth:

Respectfully represents your petitioner that he is the plaintiff in a certain action of tort against Armin Klein, brought in and now pending in the Superior Court in and for the County of Norfolk and numbered 42024 on the docket thereof; that said action was tried, with fifteen other cases, before Mr. Justice Kirk and a jury on nineteen days ending February 19, 1948, resulting in verdicts for the plaintiff for $2000. on Count 1 and $6000. on Count 8, said verdicts being entered under leave reserved; that a motion was filed by the defendant for directed verdicts in his favor on both of said counts under the leave reserved, and also a motion for a new trial; that on February 27, 1948, Mr. Justice Kirk allowed the motion for directed verdict as to Count 1 and denied it as to Count 8, and granted the motion for new trial as to Count 8 on grounds 1, 2 and 4 as set forth in the motion; that the plaintiff duly excepted thereto but subsequently waived said Count 8; that on October 3, 1951, Mr. Justice Kirk entered an order for a new trial on said Count 1; that the plaintiff has filed a consolidated bill of exceptions covering many exceptions saved by him during the trial of this and the fifteen other cases, which bill of exceptions has not as yet been acted upon by Mr. Justice Kirk; that the plaintiff duly and seasonably excepted to the order of October 3, 1951 for a new trial on said Count 1 and duly and seasonably, to wit on October 23, 1951, filed his bill of exceptions to said order, and on said day delivered

to Charles J. Dunn, Esquire, attorney of record for the defendant, a written notice of the filing of said bill of exceptions and a copy of said bill; that on January 14, 1952 the plaintiff, by his attorney Lester W. Cooch, Esquire, duly presented said bill of exceptions to Mr. Justice Kirk, and on January 15, 1952 filed in the clerk's office of Norfolk Superior Court an affidavit of the said presentation; that all requirements of law with regard to saving and completing his exception to the said order of October 3, 1951 for a new trial have been complied with by the plaintiff; that, following a hearing on June 20, 1952, Mr. Justice Kirk on the same day took the following action on said bill of exceptions:

> "The within bill of exceptions, hearing having been had on the same on this date, is disallowed because it is not conformable to the truth as to a material matter, and otherwise is not a proper bill of exceptions."

that notice of said action was received by your petitioner on June 25, 1952; that this petition is filed in the full court within twenty days of the receipt of said notice; that a copy of the bill of exceptions is attached hereto marked "A" and is incorporated in and made a part of this petition; that the said bill of exceptions is in conformity with the truth and sets forth a true statement of the pertinent facts and attendant circumstances sufficient to enable the court to determine the question of law raised by said exception; that the plaintiff, your petitioner, is aggrieved by the said order of Mr. Justice Kirk dated June 20, 1952, hereinbefore set forth, disallowing the said bill of exceptions; that before the filing of this petition, your petitioner gave notice thereof to the adverse party by delivering a copy thereof to him or his attorney of record in accordance with Rule 22 of the Rules for the Regulation of Practice Before the Full Court, as appears by the affidavit and oath annexed hereto and marked "B"; that your petitioner has complied with all the requisitions prescribed by said Rule 22;

WHEREFORE your petitioner prays that he may be allowed to establish before this court the truth of the allegations in said bill of exceptions (a copy of which is annexed hereto and marked "A") and the truth of the exceptions presented therein, and thereupon, the truth of the exceptions being established, that they be heard, and the same proceedings taken, as if the exceptions had been duly allowed and entered.

By His Attorney
LESTER W. COOCH

AFFIDAVIT

I, Lester W. Cooch, on oath depose and say that the statements and allegations in the foregoing petition subscribed by me, are true, and that the said bill of exceptions marked "A" conforms to the truth.

LESTER W. COOCH

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss July 9, 1952

Then personally appeared Lester W. Cooch and made oath that the statements and allegations in the foregoing petition to establish the truth of exceptions and the affidavit appended thereto, both of which are subscribed by him, are true, before me

A. VAN ALLEN THOMASON
Notary Public in and for
the Commonwealth of
Massachusetts

My commission expires Oct. 8, 1954

"A"

COMMONWEALTH OF MASSACHUSETTS

Norfolk, ss; Superior Court
No. 42024

DAVID RINES, ADMR. OF ESTATE OF LUCY L. RINES

v.

ARMIN KLEIN

Plaintiff's Bill of Exceptions to Order for a New Trial

This action of tort is to recover damages arising from the illness and death of Lucy L. Rines, wife of the plaintiff, of whose estate he is the administrator. This bill of exceptions relates to the order of Mr. Justice Paul G. Kirk dated October 3, 1951 that a new trial be had on Count 1 in this case.

The pleadings on which the case was tried on the merits consisted of a declaration and an answer, each of which is incorporated by reference in this bill of exceptions and may be referred to.

The case was tried with fifteen other cases before Mr. Justice Kirk and a jury at Dedham on 19 days, beginning on January 26, 1948 and ending on February 19, 1948. Dr. Reynald Chase, of New York, was produced by the plaintiff at the trial on the merits. Early in his testimony the judge ruled that he was not qualified to testify. This ruling was later changed and he was permitted to testify. His testimony began on February 11, 1948 and continued, with some interruptions, on the 12th, 13th and 16th. The official transcript of his testimony covers about 230 pages. After all testimony had been taken, the defendants moved

> "that all of the testimony of Dr. Chase, in which he gave opinions that various defendant doctors were guilty of bad practice, be struck from the record, on the ground that it now appears that he is not qualified to express any opinion as to the practice in Boston of doctors specializing in the fields in which the various

doctors have specialized, and that any evidence given by Dr. Chase to the effect that any act of malpractice on the part of any defendant doctor caused proximal damage or death, be stricken from the record, on the ground that on his own testimony he is not competent to express such an opinion."

This motion was denied by Judge Kirk.

During the trial the plaintiff waived Count 3 and the Court directed verdicts for the defendant on Counts 2, 4, 5, 6, 7 and 9.

The Jury returned verdicts as follows:

Count 1, Plaintiff for $2000.00
Count 8, Plaintiff for $6000.00

which verdicts were entered under leave reserved.

Counsel for the defendant, Charles J. Dunn, Esquire, filed a motion for directed verdicts under the leave reserved on Counts 1 and 8, which motion is incorporated in this bill of exceptions by reference and may be referred to, and also a motion for a new trial reading as follows:

Defendant's Motion for a New Trial

Now comes the defendant in the above entitled action and moves the Court after verdict and before judgment to set aside said verdict and grant a new trial and respectfully assigns as reasons therefor the following:

1. The verdict rendered in said case was against the evidence.
2. The verdict rendered in said case was against the evidence and the weight of the evidence.
3. The verdict rendered in said case was against the evidence, the weight of the evidence presented and the law.
4. The damages awarded are excessive.

By his attorney,
(Sgd) Charles J. Dunn

The motion for directed verdict under leave reserved was on February 27, 1948 allowed as to Count 1 and denied as to Count 8, after which the Court entered a verdict for the defendant under the leave reserved as to Count 1.

The Court, on February 27, 1948, took action on the motion for new trial in the following words:

> "Granted as to Count 8, on grounds 1, 2 and 4 as set forth in Motion."

The plaintiff duly excepted thereto.

On May 8, 1950, the plaintiff waived Count 8.

On January 31, 1949, the plaintiff filed his Consolidated Bill of Exceptions of 1171 typewritten pages, covering this case and the 15 other cases with which it was tried. On January 30, 1950 he filed his Substitute Consolidated Bill of Exceptions of 714 typewritten pages, with his motion to substitute it for the bill filed on January 31, 1949. The court, by Mr. Justice Paul G. Kirk, after hearing, denied this motion on January 8, 1951, but granted the plaintiff leave to file on or before May 6, 1951 his Second Substitute Consolidated Bill of Exceptions. At the hearing on this motion Judge Kirk stated that he had taken no action on the motions for new trials and that he did not intend to do so. On May 4, 1951 the plaintiff filed his Second Substitute Consolidated Bill of Exceptions of 272 typewritten pages, with motions that he be permitted to substitute it for the original bill filed on January 31, 1949 and that this last bill be allowed. No hearing has been had and no action has been taken by the court on those motions, although the plaintiff has requested Judge Kirk, both orally and in writing, to set a time for hearing them.

On February 15, 1951 Charles J. Dunn, Esquire, attorney for the defendant, wrote the following letter to Honorable Paul G. Kirk, the judge in this case:

February 15, 1951

Honorable Paul G. Kirk
Superior Court, Suffolk County
Boston, Massachusetts

Re: Rines vs. Armin Klein
Rines vs. Reuben B. Davidoff

Dear Judge:

Sometime ago I received notice from the Massachusetts Medical Society that disciplinary action had been taken by the New York Medical Society against Dr. Reynald H. Chase because of testimony given in the above cases. You will recall that Dr. Chase testified among his qualifications that he did ten deep femoral bi-lateral ligations before 1942. The Committee of Ethics and Discipline of the New York Medical Society gave Dr. Chase an opportunity to substantiate the truth of this testimony together with other statements he had made before you at the trial. They were found to be wholly false, no basis in fact or truth and, although I have not been informed of the precise penalty, I know some disciplinary measures were adopted.

In view of the above, I should like to renew the motions for new trial which I filed and which you still have not acted upon, namely David Rines, Admr. vs. Reuben Davidoff on Counts I and V and David Rines, Admr. vs. Armin Klein on Count I.

I have notified all counsel by sending them a copy of this letter.

Very truly yours,

CHARLES J. DUNN

CJD:W

On February 26, 1951, the plaintiff's attorney, Lester W. Cooch, Esquire, was notified by direction of Judge Kirk that the latter wished to see him and Mr. Dunn

> "to discuss the matters of Mr. Dunn's recent letter . . . the purpose of which is to prepare the ground for a formal hearing of the matters".

Action on this matter was postponed owing to Mr. Cooch's absence.

On June 5, 1951, Judge Kirk requested Mr. Cooch to inform Mr. Dunn that he wished to see them for a preliminary hearing to discuss Mr. Dunn's letter for the purpose of making arrangements for a formal hearing, allowing time to have witnesses come from New York, if deemed necessary. On June 12, 1951, Mr. Dunn informed Mr. Cooch that Judge Kirk had set June 25, 1951 at 4:00 p.m. in the Judges' Lobby of Suffolk Court House for seeing them in this connection.

The Plaintiff, a member of the Massachusetts Bar in good standing, requested of Judge Kirk that he be allowed to be present at this hearing, to which the Judge replied by a letter to Mr. Cooch dated June 14, 1951, as follows:

> "I have your letter wherein you request that Mr. Rines be present at the conference set down by me amongst counsel, in the above cases. So far as these cases are concerned, Mr. Rines is not a member of the Bar, but is a party plaintiff. He will not be permitted to be present."

On June 20, 1951, Mr. Rines duly entered his appearance as attorney for the plaintiff in this case and in the 15 other cases with which it was tried.

On June 25, 1951, Mr. Cooch and Mr. Dunn presented themselves at the Judges' Lobby and were ushered into a small hearing room. At 3:57 p.m. Judge Kirk entered whereupon the following colloquy occurred, in substance:

> Mr. Cooch: Your Honor, Mr. Rines is coming up.
>
> Judge Kirk: I gave you your instructions on that. He is not coming in.
>
> Mr. Cooch: There has been a little change since then. Mr. Rines has entered his appearances in each case and is now a counsel of record.
>
> Judge Kirk: I don't care whether or not he has entered appearances or what he has done, he is not going to be present at this conference and I told you so.

The judge then asked Mr. Dunn to state "what he had to say regarding the undisposed motions for new trials."

Mr. Dunn, who had some papers in front of him, said in substance the following to the judge:

> "You will recall that I wrote you last February. I am sure that you probably expected me to come here with affidavits and things of that kind. I have not got them and I think I can tell you why. Sometime ago the Massachusetts Medical Society informed me that the New York Medical Society had taken disciplinary action against Dr. Chase because of perjury before you when these cases were tried. It seems, however, that they are or were not able to furnish affirmative proof, but they could find no record of any deep femoral ligations having been performed by Dr. Chase."

The Judge interrupted by saying "Before 1942 do you mean?" Mr. Dunn said:

> "Yes. I have received this information from a doctor who I think is Dr. Gallupe and I expect that it can be called negative. I sent my brother John to New York to check it up, but he was unable to find anything to show that these operations had been performed by Dr. Chase. Possibly this may be accounted for by the fact that I understand that Dr. Chase did not cooperate by giving the names of the patients so that the records could be examined."

At this point the Court messenger opened the door and said to Judge Kirk: "Mr. Rines is here". The judge then rose and pointing his finger at Mr. Cooch said: "You go out and tell Mr. Rines that he is not going to come in here. Also, I want you to understand that there is to be no coming and going about it, it is final. Tell him that." Mr. Cooch did as instructed, and while doing so the Judge came out of the room and walked down the hall. Mr. Rines then entered the room and sat down, followed by Mr. Cooch. In a few minutes the judge returned. Standing near the entrance door he looked at Mr. Rines and said: "How do you do

Mr. Rines. Are you going to be in here?" Mr. Rines replied: "Judge Kirk, I want to talk with you. I want to inquire why you are keeping me out." Judge Kirk then said: "Gentlemen, the hearing is cancelled" and walked out.

The following day, June 26, 1951, Mr. Cooch received a telephone message at his home in Abington at 1:10 p.m. that Judge Kirk wanted to see him in the Judges' Lobby in Boston at 2:00 p.m. Upon his arrival directly from his home, both he and Mr. Dunn were ushered into the same hearing room. Judge Kirk entered and the following colloquy immediately occurred, in substance:

Judge Kirk: "This is all that will be here today".

Mr. Cooch: "Did Mr. Eckert deliver to you my message that I had followed your instructions of yesterday explicitly?"

Judge Kirk: "That was the most contemptible thing I have ever seen, and most reprehensible on your part."

Mr. Cooch: "What do you mean by 'reprehensible' on my part?"

Judge Kirk: "That entry of appearances by Mr. Rines was just a subterfuge on your part to get around instructions which I had given you. It won't work with me."

Mr. Cooch: "I wrote you some time ago that Mr. Rines demanded to be present and I assume he has a perfect right to enter his appearances and be a counsel of record."

Judge Kirk: "I consider it a subterfuge. Most lawyers are able to control their clients."

Mr. Cooch: "Mr. Rines is not only a client, but a co-attorney."

Judge Kirk: "I have seen many lawyers of equal or greater stature than you withdraw their appearances if their advice is not taken." (Pause) "I don't say that you ought to withdraw your appearances, but I still consider this a subterfuge."

Judge Kirk: "I think Mr. Dunn should have an opportunity to proceed with what he was saying before he was so rudely interrupted yesterday. For the pur-

pose of refreshing my recollection I want to be sure I understand the strategy of Mr. Schloss (the plaintiff's trial attorney) in presenting his case. Did he put the doctors on first and Dr. Chase last?"

Mr. Cooch: "I have no records with me, but I think he interspersed lay witnesses between the doctors, and that Dr. Chase was the last plaintiff's witness, unless possibly Mr. Rines came after him."

Mr. Dunn then proceeded, saying that "Dr. Chase was a liar, a perjurer, a bum and one who for plenty of money came to Boston to give false testimony. You know that this is so Judge, because in your charge you called him a charlatan". The judge made no reply of any kind to that remark.

Mr. Dunn then continued in substance that he had sent his brother John to New York, but that he had been unable, while there, to obtain any information from the hospitals showing that Dr. Chase had performed the operations about which he testified; that if Dr. Chase were on the level, he would not have withheld such vital information; that the information that he, Mr. Dunn, had came from the Massachusetts Medical Society; that he did not know whether or not Dr. Chase had been disciplined in New York, but he felt very sure that he had been; that that Society in New York was not able to corroborate the doctor's testimony in Dedham and that it had decided that the testimony was wholly false; that he, Mr. Dunn, had no information about any disciplinary action, but that he was sure something had been done along that line.

Mr. Dunn did not show to the Judge or to Mr. Cooch any letters, affidavits, or papers of any kind. He also stated that he did not consider or intend to treat the matters which he had covered in his remarks as newly-discovered evidence; that he did not intend to file any motions based on newly-discovered evidence; and that he agreed that whatever consideration is given or action taken on his request for new trial is to be limited to the motions already filed and the grounds which were listed in them.

No motion for new trial has been filed in this case, except the one previously referred to, and no affidavits of newly-discovered evidence have been filed.

The next day, June 27, 1951, Mr. Cooch wrote Judge Kirk a letter, excerpts from which, and which correctly state the facts, follow:

> "My reasons for contending that you do not at this time allow in whole or in part Mr. Dunn's motions for new trials in the Klein and Davidoff cases are:
>
> 1. It would be inconsistent with the action you have taken on the motions for directed verdicts under the leave reserved.
>
> 2. All verdicts already are for the defendants. What more would they gain by new trials? It would mean great expenditures of time and money, and the defendants might even get verdicts against them.
>
> 3. Mr. Dunn stated before you yesterday that he is not urging any newly-discovered evidence, and that he is not going to file any new motions based on that ground. Such motions, if filed, should be accompanied by affidavits, copies of which should be furnished the plaintiff so that he may have some knowledge of what is contended and have an opportunity to prepare his defense thereto at a hearing on the motions.
>
> 4. The matter therefore is limited to the motions already filed and the grounds set forth therein.
>
> 5. What is now urged by Mr. Dunn was brought out at length at the trial, including the vituperations made by him before you yesterday. The evidence which the jury had before it, and on which it properly could act, included all that Mr. Dunn now asserts, and more. The verdicts were not against that evidence, or the weight of it, or the law.
>
> 6. Despite Mr. Dunn's statement to the contrary, what he is really insisting upon now is newly-discovered matter. This is not open to him as the record now stands.

7. Assuming, but not admitting, that it is shown to you that Dr. Chase committed perjury at the trial, I contend that that point was stressed at the trial and considered by the jury.

8. Finally, what have you before you now as a result of the hearing, or conference, that you did not know before? Mr. Dunn offered nothing either factual or affirmative. He read from, or paraphrased, extracts of letters which he or someone else received, and said that his brother could find no records in New York sustaining Dr. Chase, partly, if not wholly, because Dr. Chase did not furnish the names of his patients. There was nothing offered you except negative hearsay by persons obviously greatly prejudiced. Mr. Dunn did not even show the letters to you or even read their entire contents. Mr. Dunn's letter to you February 15, 1951 said in effect merely that the Massachusetts Medical Society notified him that disciplinary action (the nature of which Mr. Dunn admits he does not know) has been taken by the New York Medical Society against Dr. Chase because of the testimony given by the doctor in the trial of our cases. Apparently that Society "gave Dr. Chase an opportunity to substantiate the truth of this testimony together with other statements he made before you at the trial". From what I can glean from Mr. Dunn's remarks, Dr. Chase did not discuss that testimony with the New York Society or give it the names of his patients. So that Society found Dr. Chase's testimony "to be wholly false, no basis in fact or truth", with some suggestions of a penalty of which Mr. Dunn disclaims knowledge! This is pretty thin material on which to base such a serious charge or to urge you to take such drastic measures at this stage, even admitting for this purpose only, that such action can now be taken on the record and material which you have before you."

Nothing further happened until Judge Kirk on October 3, 1951 entered an order for a new trial on Count 1 in this case. The said order is as follows:

Order of Court on Motion For New Trial

1. This is one of 16 cases, embracing 107 counts (subsequently reduced to 79 counts) brought by the plaintiff individually or in his capacity as administrator of his wife's estate, against the Beth Israel Hospital and numerous physicians, surgeons and nurses who attended his wife or acted as consultants during her illness.

2. The trial lasted 17 trial days.

3. The last witness for the plaintiff, and the last principal witness in the case was one Dr. Reynald H. Chase of New York who was presented to give expert opinion testimony. I initially ruled that Dr. Chase was not qualified, but on the same day, following the noon recess changed my ruling and permitted him to testify. I had grave doubts as to Dr. Chase's qualifications. In permitting Dr. Chase to testify, I was influenced, among other considerations, by the following:—the known difficulty which plaintiffs have in procuring expert witnesses in malpractice cases; the prospect that a wiser determination of his qualifications could be made after he had testified at length; the many days already expended in the trial of the cases; and the prospect that the verdicts of the jury would finally dispose of most, if not all, of the litigation.

4. I am entirely satisfied that Dr. Chase did not have the surgical experience which he testified he did have; that he was not qualified to give expert opinion testimony in these cases; that my ruling permitting him to testify was a mistake; that this mistake was the substantial if not the sole factor in producing verdicts for the plaintiff in four of the eighteen counts which were submitted to the jury; that these verdicts represent a miscarriage of justice.

5. It is therefore ordered that a new trial be had on Count 1 in the above case on the ground that the verdict is against the weight of the evidence.

Paul G. Kirk
Justice of the Superior Court

October 3, 1951

The plaintiff duly excepted to this order for new trial on Count 1 and filed with the clerk, within the required three days after the receipt from the clerk of notice thereof, his exceptions in writing, as follows:

PLAINTIFF'S CLAIM OF EXCEPTIONS TO THE ORDER OF THE COURT ON MOTION FOR NEW TRIAL

Now comes the plaintiff having on October 5, 1951 received notice from the clerk of the order of Mr. Justice Paul G. Kirk dated October 3, 1951 that a new trial be had on count 1 in the above case on the ground that the verdict is against the weight of the evidence, and, being aggrieved thereby, claims an exception therefrom to the Supreme Judicial Court.

By his attorney,
LESTER W. COOCH

This bill of exceptions contains all the evidence and facts material to the exceptions alleged.

The plaintiff, being aggrieved by the action of the Court in ordering a new trial on Count 1 in this case, exceptions to which were duly taken by him as hereinbefore set forth, files this, his bill of exceptions and prays that the same may be allowed.

DAVID RINES
Administrator of the
Estate of Lucy L. Rines

By LESTER W. COOCH
His Attorney

"B"

Affidavit

I, Lester W. Cooch, attorney of record for the petitioner, on oath depose and say that on July 10, 1952, before the filing of this petition, I delivered in hand to Charles J. Dunn, Esquire, attorney of record for the adverse party, Armin Klein, a full and complete copy of this petition to establish the truth of exceptions, including all affidavits, oaths and signatures which were a part thereof, and at the same time I delivered in hand to him a letter of which the following is a true copy:

July 10, 1952

Charles J. Dunn, Esq.
908 Barristers Hall
Boston, Massachusetts

re: Rines, admr. vs. Klein

Dear Mr. Dunn:

This is to notify you that, after delivering this notice and copy of petition to you, I shall file in the clerk's office of the full court of the Supreme Judicial Court for the Commonwealth, the original of the petition of David Rines, administrator of the estate of Lucy L. Rines, to establish the truth of his exceptions to the order of Judge Kirk dated October 3, 1951 for a new trial as to Count 1, the copy of which petition I am now delivering to you being an exact copy thereof.

LESTER W. COOCH

Attorney for David Rines Admr. of estate of Lucy L. Rines, petitioner.

LESTER W. COOCH

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. July 10, 1952

Then personally appeared Lester W. Cooch, and made oath that the statements contained in the foregoing affidavit subscribed by him, are true, before me.

HARRISON D. MASON
Notary Public in and for
the Commonwealth of
Massachusetts
My commission expires Feb. 10, 1956

A true copy, of petition and order of court thereon.

Attest,

FREDERICK L. QUINLAN
Clerk

(SEAL)

After hearing, petition dismissed on ground that exceptions do not appear meritorious.

Signed: STANLEY E. QUA,
Chief Justice.

Filed July 10, 1952
Attest: FREDERICK L. QUINLAN,
Clerk.

EXHIBIT B

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

Norfolk, ss

DAVID RINES, ADMINISTRATOR OF ESTATE OF LUCY L. RINES, PETITIONER TO ESTABLISH THE TRUTH OF EXCEPTIONS

Plaintiff's Petition to Establish the Truth of Exceptions

To the Honorable the Justices of the Supreme Judicial Court for the Commonwealth:

Respectfully represents your petitioner that he is the plaintiff in a certain action of tort against Reuben B. Davidoff, brought in and now pending in the Superior Court in and for the County of Norfolk and numbered 42028 in the docket thereof; that said action was tried, with fifteen other cases, before Mr. Justice Kirk and a jury on nineteen days ending February 19, 1948, resulting in verdicts for the plaintiff for $2000. on Count 1 and $5000. on Count 5, and for the defendant on Count 8, which said plaintiff's verdicts were entered under leave reserved; that a motion was filed by the defendant for directed verdicts in his favor on both of said counts 1 and 5 under the leave reserved, and also a motion for a new trial; that on February 27, 1948 Mr. Justice Kirk allowed the motion for directed verdicts as to Counts 1 and 5, and took no action on the motion for new trial; that the plaintiff duly excepted thereto; that on October 3, 1951, Mr. Justice Kirk entered an order for a new trial on said Counts 1 and 5; that the plaintiff has filed a consolidated bill of exceptions covering many exceptions saved by him during the trial of this and fifteen other cases, which bill of exceptions has not as yet been acted upon by Mr. Justice Kirk; that the plaintiff duly and seasonably excepted to the order of October 3, 1951 for a new trial on said Counts 1 and 5 and duly and seasonably, to wit on October 23, 1951, filed his bill of exceptions to said order, and on

said day delivered to Charles J. Dunn, Esquire, attorney of record for the defendant, a written notice of the filing of said bill of exceptions and a copy of said bill; that on January 14, 1952 the plaintiff, by his attorney Lester W. Cooch, Esquire, duly presented said bill of exceptions to Mr. Justice Kirk, and on January 15, 1952 filed in the clerk's office of Norfolk Superior Court an affidavit of the said presentation; that all requirements of law with regard to saving and completing his exception to the said order of October 3, 1951 for a new trial have been complied with by the plaintiff; that, following a hearing on June 20, 1952, Mr. Justice Kirk on the same day took the following action on said bill of exceptions:

> "The within bill of exceptions, hearing having been had on the same on this date, is disallowed because it is not conformable to the truth as to a material matter, and otherwise is not a proper bill of exceptions."

that notice of said action was received by your petitioner on June 25, 1952; that this petition is filed in the full court within twenty days of the receipt of said notice; that a copy of the bill of exceptions is attached hereto marked "A" and is incorporated in and made a part of this petition; that the said bill of exceptions is in conformity with the truth and sets forth a true statement of the pertinent facts and attendant circumstances sufficient to enable the court to determine the question of law raised by said exception; that the plaintiff, your petitioner, is aggrieved by the said order of Mr. Justice Kirk dated June 20, 1952, hereinbefore set forth, disallowing the said bill of exceptions; that before the filing of this petition, your petitioner gave notice thereof to the adverse party by delivering a copy thereof to him or his attorney of record in accordance with Rule 22 of the Rules for the Regulation of Practice Before the Full Court, as appears by the affidavit and oath annexed hereto and marked "B"; that your petitioner has complied with all the requisitions prescribed by said Rule 22;

WHEREFORE your petitioner prays that he may be allowed to establish before this court the truth of the allegations in said bill of exceptions (a copy of which is annexed hereto and marked "A") and the truth of the exceptions presented therein, and thereupon, the truth of the exceptions being established, that they be heard, and the same proceedings taken, as if the exceptions had been duly allowed and entered.

By His Attorney
LESTER W. COOCH

AFFIDAVIT

I, Lester W. Cooch, on oath depose and say that the statements and allegations in the foregoing petition subscribed by me, are true, and that the said bill of exceptions marked "A" conforms to the truth.

LESTER W. COOCH

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss July 9, 1952

Then personally appeared Lester W. Cooch and made oath that the statements and allegations in the foregoing petition to establish the truth of exceptions and the affidavit appended thereto, both of which are subscribed by him, are true, before me

A. VAN ALLEN THOMASON
Notary Public in and for
the Commonwealth of
Massachusetts

My commission expires Oct. 8, 1954

"A"

COMMONWEALTH OF MASSACHUSETTS

Norfolk, ss. Superior Court
No. 42028

DAVID RINES, ADMR. OF ESTATE OF LUCY L. RINES

v.

REUBEN B. DAVIDOFF

Plaintiff's Bill of Exceptions to Order for New Trial

This action of tort is to recover damages arising from the illness and death of Lucy L. Rines, wife of the plaintiff, of whose estate he is the administrator. This bill of exceptions relates to the order of Mr. Justice Paul G. Kirk dated October 3, 1951, that a new trial be had on Counts 1 and 5 in this case.

The pleadings on which the case was tried on the merits consisted of a declaration and an answer, each of which is incorporated by reference in this bill of exceptions and may be referred to.

The case was tried with 15 other cases before Mr. Justice Kirk and a jury at Dedham on 19 days, beginning on January 26, 1948 and ending on February 19, 1948. Dr. Reynald H. Chase, of New York, was produced by the plaintiff at the trial on the merits. Early in his testimony the judge ruled that he was not qualified to testify. This ruling was later changed and he was permitted to testify. His testimony began February 11, 1948 and continued, with some interruptions, on the 12th, 13th and 16th. The official transcript of his testimony covers about 230 pages. After all testimony had been taken, the defendants moved

> "that all of the testimony of Dr. Chase, in which he gave opinions that various defendant doctors were guilty of bad practice, be struck from the record, on the ground that it now appears that he is not qualified to express any opinion as to the practice in Boston of doctors specializing in the fields in which the various

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doctors have specialized, and that any evidence given by Dr. Chase to the effect that any act of malpractice on the part of any defendant doctor caused proximal damage or death, be stricken from the record, on the ground that on his own testimony he is not competent to express such an opinion."

This motion was denied by Judge Kirk.

During the trial the plaintiff waived Count 3 and the Court directed verdicts for the defendant on Counts 2, 4, 6 and 7.

The jury returned verdicts as follows:

Count 1, Plaintiff for $2000.00
Count 5, Plaintiff for $5000.00
Count 8, for the defendant.

which plaintiff's verdicts were entered under leave reserved.

Counsel for the defendant, Charles J. Dunn, Esquire, filed a motion for directed verdicts under the leave reserved on Counts 1 and 5, which motion is incorporated in this bill of exceptions by reference and may be referred to, and also a motion for a new trial reading as follows:

Defendant's Motion for a New Trial

Now comes the defendant in the above entitled action and moves the Court after verdict and before judgment to set aside said verdict and grant a new trial and respectfully assigns as reasons therefor the following:

1. The verdict rendered in said case was against the evidence.
2. The verdict rendered in said case was against the evidence and the weight of the evidence.
3. The verdict rendered in said case was against the evidence, the weight of the evidence presented and the law.
4. The damages awarded are excessive.

By his attorney,
(Sgd) Charles J. Dunn

The motion for directed verdict under leave reserved was on February 27, 1948 allowed as to Counts 1 and 5, after which the court entered a verdict for the defendant under the leave reserved as to said Counts 1 and 5.

The court took no action on the motion for new trial.

On January 31, 1949 the plaintiff filed his Consolidated Bill of Exceptions of 1171 typewritten pages, covering this case and the 15 other cases with which it was tried. On January 30, 1950 he filed his Substitute Consolidated Bill of Exceptions of 714 typewritten pages, with his motion to substitute it for the bill filed on January 31, 1949. The Court, by Mr. Justice Paul G. Kirk, after hearing, denied this motion on January 8, 1951, but granted the plaintiff leave to file on or before May 6, 1951 his Second Substitute Consolidated Bill of Exceptions. At the hearing on this motion Judge Kirk stated that he had taken no action on the motions for new trials and that he did not intend to do so. On May 4, 1951 the plaintiff filed his Second Substitute Consolidated Bill of Exceptions of 272 typewritten pages, with motions that he be permitted to substitute it for the original bill filed on January 31, 1949, and that this last bill be allowed. No hearing has been had and no action has been taken by the court on those motions, although the plaintiff has requested Judge Kirk, both orally and in writing, to set a time for hearing them.

On February 15, 1951 Charles J. Dunn, Esquire, attorney for the defendant, wrote the following letter to Honorable Paul G. Kirk, the judge in this case:

February 15, 1951

Honorable Paul G. Kirk
Superior Court, Suffolk County
Boston, Massachusetts

Re: Rines vs. Armin Klein
Rines vs. Reuben B. Davidoff

Dear Judge:

Sometime ago I received notice from the Massachusetts Medical Society that disciplinary action had been

taken by the New York Medical Society against Dr. Reynald H. Chase because of testimony given in the above cases. You will recall that Dr. Chase testified among his qualifications that he did ten deep femoral bi-lateral ligations before 1942. The Committee of Ethics and Discipline of the New York Medical Society gave Dr. Chase an opportunity to substantiate the truth of this testimony together with other statements he had made before you at the trial. They were found to be wholly false, no basis in fact or truth and, although I have not been informed of the precise penalty, I know some disciplinary measures were adopted.

In view of the above, I should like to renew the motions for new trial which I filed and which you still have not acted upon, namely David Rines, Admr. vs. Reuben Davidoff on Counts I and V and David Rines, Admr. vs. Armin Klein on Count I.

I have notified all counsel by sending them a copy of this letter.

Very truly yours,

CHARLES J. DUNN

CJD:W

On February 26, 1951, the plaintiff's attorney, Lester W. Cooch, Esquire, was notified by direction of Judge Kirk that the latter wished to see him and Mr. Dunn "to discuss the matters of Mr. Dunn's recent letter—the purpose of which is to prepare the ground for a formal hearing of the matter". Action on this matter was postponed owing to Mr. Cooch's absence.

On June 5, 1951, Judge Kirk requested Mr. Cooch to inform Mr. Dunn that he wished to see them for a preliminary hearing to discuss Mr. Dunn's letter for the purpose of making arrangements for a formal hearing, allowing time to have witnesses come from New York, if deemed necessary. On June 12, 1951, Mr. Dunn informed Mr. Cooch that Judge Kirk had set June 25, 1951 at 4:00 p.m. in the Judges' Lobby of Suffolk Court House for seeing them in this connection.

The plaintiff, a member of the Massachusetts Bar in good standing, requested of Judge Kirk that he be allowed to be present at this hearing, to which the judge replied by a letter to Mr. Cooch dated June 14, 1951 as follows:

> "I have your letter wherein you request that Mr. Rines be present at the conference set down by me amongst counsel, in the above cases. So far as these cases are concerned, Mr. Rines is not a member of the Bar, but is a party plaintiff. He will not be permitted to be present."

On June 20, 1951, Mr. Rines duly entered his appearances as attorney for the plaintiff in this case and in the 15 other cases with which it was tried.

On June 25, 1951, Mr. Cooch and Mr. Dunn presented themselves at the Judges' Lobby and were ushered into a small hearing room. At 3:57 p.m. Judge Kirk entered whereupon the following colloquy occurred, in substance:

> Mr. Cooch: Your Honor, Mr. Rines is coming up.
>
> Judge Kirk: I gave you your instructions on that. He is not coming in.
>
> Mr. Cooch: There has been a little change since then. Mr. Rines has entered his appearances in each case and is now a counsel of record.
>
> Judge Kirk: I don't care whether or not he has entered appearances or what he has done, he is not going to be present at this conference and I told you so.

The Judge then asked Mr. Dunn to state "what he had to say regarding the undisposed motions for new trials."

Mr. Dunn, who had some papers in front of him, said in substance the following to the Judge:

> "You will recall that I wrote you last February. I am sure that you probably expected me to come here with affidavits and things of that kind. I have not got them and I think I can tell you why. Sometime ago the Massachusetts Medical Society informed me that the New York Medical Society had taken disciplinary

action against Dr. Chase because of perjury before you when these cases were tried.

It seems, however, that they are or were not able to furnish affirmative proof, but they could find no record of any deep femoral ligations having been performed by Dr. Chase."

The Judge interrupted by saying "Before 1942 do you mean?" Mr. Dunn said

"Yes. I have received this information from a doctor who I think is Dr. Gallupe and I expect that it can be called negative. I sent my brother John to New York to check it up, but he was unable to find anything to show that these operations had been performed by Dr. Chase. Possibly this may be accounted for by the fact that I understand Dr. Chase did not cooperate by giving the names of the patients so that the records could be examined."

At this point the Court messenger opened the door and said to Judge Kirk: "Mr. Rines is here". The judge then rose and pointing his finger at Mr. Cooch said: "You go out and tell Mr. Rines that he is not going to come in here. Also, I want you to understand there is to be no coming and going about it, it is final. Tell him that". Mr. Cooch did as instructed, and while doing so the judge came out of the room and walked down the hall. Mr. Rines then entered the room and sat down, followed by Mr. Cooch. In a few minutes the judge returned. Standing near the entrance door he looked at Mr. Rines and said: "How do you do, Mr. Rines. Are you going to be in here?" Mr. Rines replied: "Judge Kirk, I want to talk with you. I want to inquire why you are keeping me out." Judge Kirk then said: "Gentlemen, the hearing is cancelled" and walked out.

The following day, June 26, 1951, Mr. Cooch received a telephone message at his home in Abington at 1:10 p.m. that Judge Kirk wanted to see him in the Judges' Lobby in

Boston at 2:00 p.m. Upon his arrival directly from his home, both he and Mr. Dunn were ushered into the same hearing room. Judge Kirk entered and the following colloquy immediately occurred, in substance:

Judge Kirk: This is all that will be here today.

Mr. Cooch: Did Mr. Eckert deliver to you my message that I had followed your instructions of yesterday explicitly?

Judge Kirk: That was the most contemptible thing I have ever seen, and most reprehensible on your part.

Mr. Cooch: What do you mean by 'reprehensible' on my part?

Judge Kirk: That entry of appearances by Mr. Rines was just a subterfuge on your part to get around instructions which I had given you. It won't work with me.

Mr. Cooch: I wrote you some time ago that Mr. Rines demanded to be present and I assume he has a perfect right to enter his appearances and be a counsel of record.

Judge Kirk: I consider it a subterfuge. Most lawyers are able to control their clients.

Mr. Cooch: Mr. Rines is not only a client, but a co-attorney.

Judge Kirk: I have seen many lawyers of equal or greater stature than you withdraw their appearances if their advice is not taken. (pause) I don't say that you ought to withdraw your appearances, but I still consider this a subterfuge.

Judge Kirk: I think Mr. Dunn should have an opportunity to proceed with what he was saying before he was so rudely interrupted yesterday. For the purpose of refreshing my recollection I want to be sure I understand the strategy of Mr. Schloss (the plaintiff's trial attorney) in presenting his case. Did he put the doctors on first and Dr. Chase last?

Mr. Cooch: I have no records with me, but I think he interspersed lay witnesses between the doctors, and that Dr. Chase was the last plaintiff's witness, unless possibly Mr. Rines came after him.

Mr. Dunn then proceeded, saying that "Dr. Chase was a liar, a perjurer, a bum and one who for plenty of money came to Boston to give false testimony. You know that this is so Judge, because in your charge you called him a charlatan." The judge made no reply of any kind to that remark.

Mr. Dunn then continued in substance that he had sent his brother John to New York, but that he had been unable, while there, to obtain any information from the hospitals showing that Dr. Chase had performed the operations about which he testified; that if Dr. Chase were on the level, he would not have withheld such vital information; that the information that he, Mr. Dunn, had came from the Massachusetts Medical Society; that he did not know whether or not Dr. Chase had been disciplined in New York, but he felt very sure that he had been; that that Society in New York was not able to corroborate the doctor's testimony in Dedham and that it had decided that the testimony was wholly false; that he, Mr. Dunn, had no information about any disciplinary action, but he was sure something had had been done along that line.

Mr. Dunn did not show to the Judge or to Mr. Cooch any letters, affidavits, or papers of any kind. He also stated that he did not consider or intend to treat the matters which he had covered in his remarks as newly-discovered evidence; that he did not intend to file any motions based on newly-discovered evidence; and that he agreed that whatever consideration is given or action taken on his request for new trial is to be limited to the motions already filed and the grounds which were listed in them.

No motion for new trial has been filed in this case, except the one previously referred to, and no affidavits of newly-discovered evidence have been filed.

The next day June 27, 1951, Mr. Cooch wrote Judge Kirk a letter, excerpts from which, and which correctly state the facts, follow:

"My reasons for contending that you do not at this time allow in whole or in part Mr. Dunn's motions for new trials in the Klein and Davidoff cases are:

1. It would be inconsistent with the action you have taken on the motions for directed verdicts under the leave reserved.

2. All verdicts already are for the defendants. What more would they gain by new trials? It would mean great expenditures of time and money, and the defendants might even get verdicts against them.

3. Mr. Dunn stated before you yesterday that he is not urging any newly-discovered evidence, and that he is not going to file any new motions based on that ground. Such motions, if filed, should be accompanied by affidavits, copies of which should be furnished the plaintiff so that he may have some knowledge of what is contended and have an opportunity to prepare his defense thereto at a hearing on the motions.

4. The matter therefore is limited to the motions already filed and the grounds set forth therein.

5. What is now urged by Mr. Dunn was brought out at length at the trial, including the vituperations made by him before you yesterday. The evidence which the jury had before it, and on which it properly could act, included all that Mr. Dunn now asserts, and more. The verdicts were not against that evidence, or the weight of it, or the law.

6. Despite Mr. Dunn's statement to the contrary, what he is really insisting upon now is newly-discovered matter. This is not open to him as the record now stands.

7. Assuming, but not admitting, that it is shown to you that Dr. Chase committed perjury at the trial, I contend that that point was stressed at the trial and considered by the jury.

8. Finally, what have you before you now as a result of the hearing, or conference, that you did not know before? Mr. Dunn offered nothing either factual or affirmative. He read from, or paraphrased, extracts

of letters which he or some one else received, and said that his brother could find no records in New York sustaining Dr. Chase, partly, if not wholly, because Dr. Chase did not furnish the names of his patients. There was nothing offered you except negative hearsay by persons obviously greatly prejudiced. Mr. Dunn did not even show the letters to you, or even read their entire contents. Mr. Dunn's letter to you February 15, 1951 said in effect merely that the Massachusetts Medical Society notified him that disciplinary action (the nature of which Mr. Dunn admits he does not know) has been taken by the New York Medical Society against Dr. Chase because of the testimony given by the doctor in the trial of our cases. Apparently that Society "gave Dr. Chase an opportunity to substantiate the truth of this testimony together with other statements he made before you at the trial." From what I can glean from Mr. Dunn's remarks, Dr. Chase did not discuss that testimony with the New York Society or give it the names of his patients. So that Society found Dr. Chase's testimony, "to be wholly false, no basis in fact or truth", with some suggestions of a penalty, of which Mr. Dunn disclaims knowledge! This is pretty thin material on which to base such a serious charge or to urge you to take such drastic measures at this stage, even admitting for this purpose only, that such action can now be taken on the record and material which you have before you."

Nothing further happened until Judge Kirk on October 3, 1951 entered an order for a new trial on Counts 1 and 5 in this case. The said order is as follows:

ORDER OF COURT ON MOTION FOR NEW TRIAL

1. This is one of 16 cases, embracing 107 counts (subsequently reduced to 79 counts) brought by the plaintiff individually or in his capacity as administrator of his wife's estate, against the Beth Israel Hospital and numerous physicians, surgeons and nurses who attended his wife or acted as consultants during her illness.

2. The trial lasted 17 trial days.

3. The last witness for the plaintiff, and the last principal witness in the case, was one Dr. Reynald H. Chase of New York who was presented to give expert opinion testimony. I initially ruled that Dr. Chase was not qualified, but on the same day, following the noon recess, changed my ruling and permitted him to testify. I had grave doubts as to Dr. Chase's qualifications. In permitting Dr. Chase to testify, I was influenced, among other considerations, by the following:—the known difficulty which plaintiffs have in procuring expert witnesses in malpractice cases; the prospect that a wiser determination of his qualifications could be made after he had testified at length; the many days already expended in the trial of the cases; and the prospect that the verdicts of the jury would finally dispose of most, if not all, of the litigation.

4. I am entirely satisfied that Dr. Chase did not have the surgical experience which he testified he did have; that he was not qualified to give expert opinion testimony in these cases; that my ruling permitting him to testify was a mistake; that this mistake was the substantial if not the sole factor in producing verdicts for the plaintiff in four of the eighteen counts which were submitted to the jury; and that these verdicts represent a miscarriage of justice.

5. It is therefore ordered that a new trial be had on Counts 1 and 5 in the above case on the ground that verdicts thus returned are against the weight of the evidence.

(Sgd) Paul G. Kirk
Justice of the Superior Court.

October 3, 1951

The plaintiff duly excepted to this order for new trial on Counts 1 and 5 and filed with the clerk, within the required three days after the receipt from the clerk of notice thereof, his exceptions in writing, as follows:

PLAINTIFF'S CLAIM OF EXCEPTIONS TO THE ORDER OF THE COURT ON MOTION FOR NEW TRIAL

Now comes the plaintiff, having on October 5, 1951 received notice from the clerk of the order of Mr. Justice Paul G. Kirk dated October 3, 1951 that a new trial be had on Counts 1 and 5 in the above case on the ground that the verdict is against the weight of the evidence, and, being aggrieved thereby, claims an exception therefrom to the Supreme Judicial Court.

By his attorney
LESTER W. COOCH

This bill of exceptions contains all the evidence and facts material to the exceptions alleged.

The plaintiff, being aggrieved by the action of the Court in ordering a new trial on Counts 1 and 5 in this case, exceptions to which were duly taken by him as hereinbefore set forth, files this, his bill of exceptions and prays that the same may be allowed.

DAVID RINES,
Administrator of the Estate of Lucy L. Rines

By LESTER W. COOCH
His Attorney

"B"

Affidavit

I, Lester W. Cooch, attorney of record for the petitioner, on oath depose and say that on July 10, 1952, before the filing of this petition, I delivered in hand to Charles J. Dunn, Esquire, attorney of record for the adverse party, Reuben B. Davidoff, a full and complete copy of this petition to establish the truth of exceptions, including all affidavits, oaths and signatures which were a part thereof, and at the same time I delivered in hand to him a letter of which the following is a true copy:

Charles J. Dunn, Esq.
908 Barristers Hall
Boston, Massachusetts

July 10, 1952

Re: Rines, admr. vs. Davidoff

Dear Mr. Dunn:

This is to notify you that, after delivering this notice and copy of petition to you, I shall file in the clerk's office of the full court of the Supreme Judicial Court for the Commonwealth, the original of the petition of David Rines, administrator of the estate of Lucy L. Rines, to establish the truth of his exceptions to the order of Judge Kirk dated October 3, 1951 for a new trial as to Counts 1 and 5, a copy of which petition I am now delivering to you being an exact copy thereof.

LESTER W. COOCH
Attorney for David Rines, Admr. of estate of Lucy L. Rines, petitioner.

LESTER W. COOCH

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. July 10, 1952

Then personally appeared Lester W. Cooch, and made oath that the statements contained in the foregoing affidavit subscribed by him, are true, before me

HARRISON D. MASON
Notary Public in and for
the Commonwealth of
Massachusetts
My commission expires Feb. 10, 1956

A true copy, of petition and order of court thereon.

Attest,

(SEAL)

FREDERICK L. QUINLAN
Clerk

After hearing, petition dismissed on ground that exceptions do not appear meritorious.

Signed: STANLEY E. QUA,
Chief Justice.

Filed July 10, 1952
Attest: FREDERICK L. QUINLAN,
Clerk.

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